Chung Chen Phin v Siew Nyet Moi @ Sopiah Abdullah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–848–04 OF 2012
RAMLY ALI, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
23 SEPTEMBER 2013

Civil Procedure — Appeal — Finding of facts — Whether appellate interference required — Declaratory prayers granted consistent with evidence and findings of the judge — Appeal against finding of physical facts — Relevant issues considered by judge — Whether acid test of reasonableness passed

The appellant/plaintiff's claim against the defendants was for a declaration that the plaintiff was the legal and beneficial owner of the disputed land and was seeking an injunction to restrain the defendants from taking the title deed, and also from selling, charging, leasing, etc. The plaintiff and defendants had entered into a sale and purchase agreement for the said land. It was the plaintiff's case that the defendants executed a power of attorney, memorandum of transfer in escrow, etc; and the first defendant was the attorney of the second and third defendants/respondent. The defendants however subsequently refused to transfer the land to the plaintiff and in consequence the plaintiff commenced the present action. The learned judge ('judge') found that the third defendant's signature was forged and that the third defendant's counterclaim was time barred. In consequence the judge allowed the plaintiff's claim against the first and second defendants only and dismissed the third defendant's counterclaim. The plaintiff appealed against part of the decision and the third defendant cross-appealed.

Held, dismissing the appeal and cross-appeal with no order as to costs:

(1) The order of the court should stand as there was no complaint or challenge on any part of the order except as to the declaratory relief. The declaratory prayers granted were consistent with the evidence and findings of the judge (see para 8(c)).

(2) The complaint of the appellant and respondent in the instant case was one relating to a finding of physical facts. The judge had not misdirected himself as averred in the respective memorandum of appeal. The judge had directed his mind to the relevant issues and had acted in accordance with the law and the decision passed the acid test of reasonableness (see para 9).

[Bahasa Malaysia summary

Tuntutan perayu/plaintif terhadap defendan-defendan adalah untuk perisytiharan bahawa plaintif adalah pemilik undang-undang dan benefisiari tanah yang dipertikaikan dan memohon injunksi untuk menghalang defendan-defendan daripada mengambil hak milik ikatan, dan juga daripada menjual, mengenakan bayaran, menyewa dan lain-lain lagi. Plaintif dan defendan-defendan telah memasuki perjanjian jual beli untuk tanah tersebut. Adalah kes plaintif bahawa defendan-defendan melaksanakan surat kuasa wakil, memorandum pindaan dalam eskrow, dan lain-lain lagi; dan defendan pertama adalah peguam defendan-defendan/responden kedua dan ketiga. Defendan-defendan walau bagaimanapun menolak daripada memindahkan tanah kepada plaintif dan akibatnya plaintif memulakan tindakan ini. Hakim yang bijaksana ('hakim') mendapati bahawa tandatangan defendan ketiga palsu dan tuntutan balas defendan ketiga dihalang masa. Oleh itu hakim membenarkan hanya tuntutan plaintif terhadap defendan-defendan pertama dan kedua dan menolak tuntutan balas defendan ketiga. Plaintif merayu terhadap sebahagian daripada keputusan tersebut dan defendan ketiga merayu balas.

Diputuskan, menolak rayuan dan rayuan balas tanpa perintah kepada kos:

(1) Perintah mahkamah patut kekal memandangkan tiada aduan atau cabaran atas mana-mana bahagian perintah kecuali terhadap relief perisytiharan. Permohonan perisytiharan yang diberikan adalah konsisten dengan keterangan dan dapatan hakim (lihat perenggan 8(c)).

(2) Aduan perayu dan responden dalam kes ini adalah satu yang berkait kepada dapatan fakta fizikal. Hakim tidak tersalah arah dirinya seperti yang dihujahkan di dalam memorandum rayuan masing-masing. Hakim telah mengarahkan mindanya kepada isu-isu relevan dan telah bertindak mengikut undang-undang dan keputusan tersebut lulus ujian asid kemunasabahan (lihat perenggan 9).]

Notes

For a case on finding of facts, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1196.

Cases referred to

Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd [2012] 1 LNS 994, HC (refd)

Appeal from: Suit No S22–21 of 2010 (High Court, Sandakan)

Edwin Tsen (Tan Pang Tsen & Co) for the appellant.
Victor Chong (Poh & Victor Chong) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/plaintiff's appeal against part of the decision of the High Court and the cross-appeal of the respondent/third defendant came up for hearing on 15 May 2013 and on the same day we dismissed the appeal and cross appeal. My learned brothers Ramly bin Hj Ali JCA and Mohtarudin bin Baki JCA have read the judgment and approved the same. This is our judgment.

[2] This appeal relates to finding of facts. As a general rule finding of facts of a trial court is rarely disturbed by the appellate court more so when it relates to physical facts. As long as the trial judge had directed his mind to the relevant issues, and had acted in accordance with the law and the decision passes the test of reasonableness, the finding of facts relating to physical facts will not be ordinarily disturbed notwithstanding that the judgment is brief and direct to the point.

[3] The appellant's has filed a lengthy memorandum of appeal and, inter alia, it reads as follows:

MEMORANDUM OF APPEAL

Chung Chen Phin, the above named appellant/plaintiff, appeals against the part of the decision of the learned judicial commissioner (LJC) given on 16 December 2011 in dismissing the claim against the respondent/third defendant in the action that she did not sign the power of attorney dated 2 August 2005 to appoint the first defendant as her lawful attorney to, inter alia, sell the land under CL 255340133 (the said land).

The LJC had erred in law and in fact when he dismissed the appellant's claim against the respondent for the following reasons:

Evidence of the respondent signing the power of attorney and admission of selling the land to the appellant

(a) The respondent had not adduced any evidence that the first defendant had forged her signature;

(i) The respondent had in another sales and purchase agreement dated 3 December 2009 agreeing to sell the said land the purchasers Siew On Phin and Seow Soon Fah at the agreed price of RM3,500 per acre had admitted under preamble E that she and the 1st and second defendants, as 'vendors represent that the said land is subject to numerous prior sales ('the said prior sales') and that the respondent and the first and second defendants had agreed to repay the sum of RM86,000 to the appellant;

(ii) The appellant had called the justice of peace, Ramdi Indang (PW2),

to testify that the respondent had signed the power of attorney (PA) to appoint the first defendant as her lawful attorney and the PW2 had checked the identity card of the respondent before she executed the PA. This was the standard practice of the witness when attesting the signatures of anyone who came before him.

(iii) The respondent had lodged police reports against the alleged forgery by the first defendant had not forged her signature on the said PA.

(iv) The respondent, together with the first and second defendant, were motivated by greed as the sale to the appellant was RM500.00 per acre in 2005 and the sale to the other purchasers in 2009 was RM3,500 per acre. It was probable that the respondent together with the first defendant had concocted the story that she did not execute the PA to try and get out of the bargain now that they can sell the land at seven times the value.

(v) The respondent knew that she had sold the said land to the appellant as she knew that the appellant had helped her to settle the tax payable for the sale of the said land and she did not raise any objection to the sale of the said land to the appellant.

(vi) The first defendant had also admitted he did bring the respondent to the office of PW2 for her to sign the PA.

(b) The LJC also erred in law and in fact when he held that the respondent could not have come back to Sabah when she was doing a course in Penang when it is improbable for her to say so as there were holidays and her home is in Sabah and it is very probable that she would have come back to Kota Kinabalu during the holidays. The respondent is a very educated person and has a PhD under her name and she had admitted that she had understood the content of the sales agreement date 3 December 2009 before signing it admitting that she did sell the said land to, inter alia, the appellant.

(c) The LJC erred in law and in fact when he failed to consider that the evidential burden fell on the respondent to show that her signature was forged when the appellant had called PW2 to testify that she did sign the PA in his presence. The first defendant had testified that he had brought the respondent to the office of PW2,that she had admitted that she did sign the sales agreement with the appellant and when she had withdrawn the police reports she had made against the first defendant for purportedly forging her signature on the PA. The appellant had discharged the burden that the respondent had in fact signed the PA on a balance of probabilities. The Respondent had failed to discharge her burden.

(d) The LJC erred in law and in fact when he failed to consider that the respondent is further stopped from denying that she did in fact execute the PA in the light of the evidence before him.

(e) The LJC erred in law and in fact when he failed to cast an adverse inference against the respondent for failing to call a lawyer, Mr Chin Tai Kong, to

testify that the appellant had agreed the compensation of RM86,000.00, which her witness had testified at the trial and denied by the appellant.

(f) Wherefore the appellant prays that the appeal be allowed and the decision of the LJC in dismissing the claim of the appellant against the respondent be set aside and that a declaration be granted to the appellant that the respondent had sold her interest in the said land to the appellant with costs here and below. The respondent be also ordered to pay damages to be assessed. The balance of the purchase price of RM5,000.00 is to be offset to pay for the costs and damages to the appellant.'

[4] The respondent/third defendant's cross-appeal reads as follows:

NOTICE OF CROSS-APPEAL

TAKE NOTICE, that on the hearing of the above appeal, SIEW NYET MOI @ SOPIAH ABDULLAH, the Respondent abovenamed, will contend that the decision of the honourable judicial commissioner, Tuan Lee Heng Cheong given at the High Court in Sabah and Sarawak at Sandakan on 16 December 2011 ought to be varied to the extent and on the grounds hereinafter set out:

(a) The learned judicial commissioner having appreciated the various grounds/issues of defence raised by the respondent ought to have considered and made a ruling in respect of the ground/issue that the purported sale and purchase agreement dated 10 August 2005 sought to be enforced by the appellant could not be enforced on the ground that the same is prohibited by the special term in the letter of offer and draft title deed;

(b) The special term therein provides that 'This title shall not be assigned or dealt with in any manner by way of, power of attorney or any other means unless and until it is registered';

(c) The learned judicial commissioner ought to have made a finding and ruled in favour of the respondent on the above ground/issue in view of the clear statutory and/or legal prohibition, which inevitably leads to the appellant's whole action being dismissed.

BRIEF FACTS

[5] The plaintiff's claim against the first to third defendant is for a declaration that the plaintiff is the legal and beneficial owner of the disputed land and was seeking an injunction to restrain the defendants from taking the title deed, and also from selling, charging, leasing, etc.

[6] The respondent/third defendant has by way of counterclaim against the plaintiff and the first and second defendants had sought various counterclaim related to the same subject matter.

[7] The learned trial judge has in his 11 pages judgment set out the facts, issues and problems and we do not wish to repeat the same save as to deal with the core issues. In the instant case:

(a) The plaintiff and defendant had entered into a sale and purchase agreement for the said land for the consideration of RM50,000.

(b) It was the plaintiff's case that the defendants executed a power of attorney, memorandum of transfer in escrow, etc; and the first defendant was the attorney of the second and third defendants are owners of property.

(c) The balance purchase price was paid to solicitors and also premium and other expenses were also paid. Subsequently the plaintiff discovered the defendants had failed to deliver the title to the plaintiff.

(d) The third defendant is said to know of the sale of her land. The defendants refused to transfer the land and in consequence the plaintiff had sought the relevant declarations and prayers (see Vol 1 p 34 of the appeal record).

[8] We have read the appeal record and submission of the parties in detail. The court is grateful to the parties for the comprehensive submission. We take the view the appeal and cross-appeal must be dismissed. Our reasons, inter alia, are as follows:

(a) The dispute revolves in a sale of land and the issues is related to finding of facts which the learned judge had dealt with in great detail.

(b) It was the finding of the learned judge that:

(i) The third defendant's signature was forged and the first defendant has also admitted that the signature was forged;

(ii) The second defendant was the power of attorney of the second defendant who did not defend the suit;

(iii) The third defendant's counterclaim was time barred. In consequence the learned judge allowed the plaintiff's claim against the first and second defendants only and dismissed the third defendant's counterclaim.

(c) We are of the considered view that the order of the court at pp 12 and 13 of the appeal record should stand as there was no complaint or challenge on any part of the order except as to the declaratory relief. And the

declaratory prayers granted are consistent with the evidence and findings of the learned judge, taking into consideration it relates to the sale and purchase agreement.

(d) In consequence of the trial judge findings related to the facts, we find no merits in the respondent/third defendant's cross-appeal.

[9] The complaint of the appellant and respondent in the instant case is one relating to a finding of physical facts. We have carefully examined the complaints and the judgment and the evidence. We are satisfied that the learned judge had not misdirected himself as averred in the respective memorandum of appeal. In the instant case, we are satisfied that the learned judge had directed his mind to the relevant issues and had acted in accordance with the law and the decision passes the acid test of reasonableness, see *Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd* [2012] 1 LNS 994].

[10] In consequence the appeal and cross-appeal are dismissed with no order as to costs.

We hereby order so.

Appeal and cross-appeal dismissed with no order as to costs.

Reported by Kanesh Sundrum